No. 15,123

IN THE

United States Court of Appeals

For the Ninth Circuit

W. A. ROBISON, Administrator of the Estate of Robert Sidebotham, Deceased, ROBERT SIDEBOTHAM and JAMES SIDEBOTHAM,

Appellants,

vs.

HELENE MARCEAU SIDEBOTHAM,

Appellee.

APPELLANTS' BRIEF.

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PAUL P. O'BRIEN, CL

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APPELLANTS' BRIEF.

There are two appeals in this case. One from the judgment and one from an order regarding expenses of defense. The appeal from the order re expenses is separately briefed. The main case reached the District Court on a petition for removal of the cause from the California Superior Court to the District Court by reason of the diversity of citizenship of the parties.

The other appeal, based on the same record, is from an order denying appellant W. A. Robison as administrator of an estate an allowance out of the fund before the Court for his expenses in defending said action as administrator.

The nature of the case is a claim by the plaintiff, the divorced wife of the decedent, Robert Sidebotham, that there was property in existence at the time of the death of Robert Sidebotham, deceased, on December 21, 1951, which was community property of the parties when they were divorced in Nevada on November 14, 1946 and which the Court then failed to divide. If the divorced wife's claim is correct (which we deny), she would have an undivided half interest as surviving tenant in common in all the property which he owned at the time of his divorce and which his divorced wife could trace into his estate.

The main questions involved on this appeal are four in number, and are succinctly stated as follows:

1. Whether the decree of the Superior Court of the State of California for San Francisco County filed December 14, 1953, determining that the appellee herein had no rights to any of the assets in the estate of Robert Sidebotham, deceased, operated as a complete bar to all of appellee's rights claimed in this action under the doctrine of *res adjudicata.*

2. Whether the appellee divorced wife identified or traced any of the assets owned by Robert Sidebotham, deceased, at the time of his death as being assets which he owned at the time of the divorce in Nevada in 1946 or at the time of the divorce in Wyoming in 1940?

3. Whether appellee's alleged cause of action is barred under the provisions of the California Statute of Limitations?

4. Whether appellee's alleged cause of action is barred by the doctrine of laches?

5. Whether appellee's alleged cause of action is barred by the doctrine of estoppel?

6. Whether appellee's alleged cause of action is barred by the Nevada divorce decree filed November 14, 1946 under the doctrine of *res adjudicata?*

The specifications of error relied upon are as follows:

1. The District Court erroneously found that all the property owned by Robert Sidebotham, deceased, at the time of his death on December 21, 1951 was property which he owned at the time of the Nevada divorce in 1946.

2. The District Court erroneously found that the property owned by Robert Sidebotham, deceased, at the time of his death on December 21, 1951 was property which he owned on November 2, 1940, when he divorced the plaintiff in the State of Wyoming.

3. That the District Court erroneously found that the divorce decree of the State of Wyoming dated November 2, 1940, dissolving appellee's marriage with Robert Sidebotham, was invalid and subject to collateral attack.

4. That the District Court erred in finding that appellee's cause of action was not barred by the rule of *res adjudicata,* which rule should have been applied by reason of the decree of the Probate Court of the State of California in a proceeding determining heirship in the matter of the estate of Robert

Russell Sidebotham, deceased, filed therein on December 14, 1953.

5. The District Court erred in not finding that appellee's cause of action was barred by the provisions of the California Statute of Limitations.

6. The District Court erred in not finding that the appellee's cause of action was barred by the doctrine of laches.

7. The District Court erred in not finding that appellee's cause of action was barred under the rule of *res adjudicata,* which rule should be applied by reason of the terms of the divorce decree in the State of Nevada filed on November 14, 1946, by which respondent divorced Robert Russell Sidebotham, deceased.

8. The District Court erred in not finding that appellee's cause of action was barred by the doctrine of equitable estoppel.

9. The District Court erred in admitting various pieces of testimony in evidence. These erroneous rulings and the objections thereto are set forth in detail under the heading "MISCELLANEOUS RULINGS ON EVIDENCE COMPLAINED OF" on pages 42-48 of this brief.

ARGUMENT.

THE FACTS.

According to the third amended complaint (personally sworn to by the appellee) she was married to

Mr. Sidebotham on January 1, 1927, in New York, which admittedly was a common law marriage. (Tr. 88.) At the trial appellee for some mysterious reason withdrew this allegation and fell back on a Tijuana, Mexico, civil marriage, which took place before a civil officer on May 30, 1928. (Tr. 89.) For some unknown reason appellee strenuously opposed all efforts to go into the New York marriage and in fact positively denied that there had been any such marriage. (Tr. 87-88.) The record shows she travelled all over the United States with him for about a year and a half thereafter being at that period unmarried to him. (Tr. 86-91.)

After the now repudiated New York marriage, respondent testified she went to Boston with Mr. Sidebotham and stayed there with him for about six months. (Tr. 90.) Then about Christmastime of 1927 she went to San Francisco with him (Tr. 90) and after several months there she went to Los Angeles with him (Tr. 90) and eventually went from there to Tijuana, Mexico, to marry him. (Tr. 94.) She remained at Los Angeles and at Arrowhead Lake for several years until about 1935 (Tr. 94) when she and Mr. Sidebotham went to San Francisco together. (Tr. 98.)

LACHES.

In answer to questioning by her counsel she testified that she was "happily married" from 1930 to 1935 (Tr. 94), which was *far from the truth,* as the record shows in many respects without contradiction. These matters may seem at first blush unimportant.

However, they are vitally important on the question of laches and equitable estoppel as is shown by the discussion in the case of *Champion v. Wood,* 79 Cal. 17, 21 P. 534, which could have been written for this case so similar are the facts. We will show the Court by five written statements signed by her how completely false this statement about their marital bliss was.

1. On April 24, 1930, she extorted an agreement from her husband to pay her 10 per cent of his earnings indefinitely and a minimum of $1,000.00 as balm for assault and battery. See the agreement itself which is attached as an exhibit to her complaint filed against him for separate maintenance in Los Angeles on March 31, 1933. (See Defendants' Exhibit C.)

AGREEMENT

This Agreement made and entered into this 24th day of April, 1930, by and between Robert R. Sidebotham and Madeline Sidebotham, of Los Angeles, California, hereinafter referred to as Robert and Madeline, for and in consideration of the sum of Twenty-five Dollars, ($25.00) in hand paid and the further consideration of Robert assigning to Madeline one-half of all the moneys due him at this time from the Frank L. Green organization, and the further consideration of receiving ten per cent of all the moneys that may be received from his employment agreement now in force with Lawrence & Company, Madeline hereby agrees, in consideration of the above named consideration, that she will not prosecute or cause to have prosecuted the above referred to Robert for al-

leged assault and battery, or any other criminal acts or alleged criminal acts that she may have, or thinks she has knowledge of.

It is understood that Robert will assist her to collect such moneys as may be due from above referred to Green and in the event that these sums do not total $1000 between this date and May 15th, 1930, he will pay to the said Madeline the difference between the amounts received by her from the above mentioned consideration to make the full amount to be paid under this agreement $1000. May 15th, 1930. And that the said Madeline further agrees to relinquish a certain affidavit or statement made by Ruth Cross.

Witness
(Signed) Mrs. A. L. Cloud
(Signed) Madeline Sidebotham
(Signed) Robert R. Sidebotham

2. In her Nevada divorce complaint (Defs' Ex. E) she alleged that "Since on or about June 30, 1931, at Los Angeles, California, the plaintiff and defendant lived separate and apart from each other without cohabitation". Her counsel got her to change this date on re-direct examination to "June 30, 1941", (Tr. 116) forgetting that *at that time she was living by herself in San Francisco,* (Tr. 110-111) whereas, as she testified on cross-examination, she was living in Los Angeles on June 30, 1931. (Tr. 117.) We call attention to another falsehood in the same allegation. She testified that after she went to San Francisco in 1935 she cohabited with him at two of her addresses in San Francisco, the Hansa Hotel and at 380 Union Street.

3. In her sworn separate maintenance complaint in Los Angeles she alleged that she and her husband separated on February 5, 1932, (Defendants' Exhibit C), although in her Nevada sworn complaint she said they separated on June 30, 1931.

4. On March 3, 1932, she wrote the first Mrs. Sidebotham "I am getting divorce from Bob" and that she planned "to establish a settlement". (Defendants' Exhibit D.)

5. On March 31, 1933, she filed a separate maintenance action against her husband in Los Angeles containing many vivid allegations of extreme cruelty covering several years of misconduct. (Defendants' Exhibit C.)

If plaintiff had been shown to have lived a marital life without any discord and in close union with her husband for many years and also that she was wholly ignorant of Court proceedings, property settlements and business affairs, such matters might have some bearing on disregarding the application of the doctrines of *laches and estoppel.*

However, the exact opposite is the case here!

It appears from her sworn complaint filed in a Los Angeles separate maintenance suit on March 31, 1933, (Defendants' Exhibit C) *prepared by her present astute counsel* (Tr. 95) that less than twenty-three (23) months after the Mexican marriage contract her husband struck her many times and threatened to kill her. (Defendants' Exhibit C.) His acts as described by her were of such a criminal nature that he feared she would have him jailed so she succeeded in ex-

March 3rd 1932.

Dear Mrs Sidebotham,

This is quite important that I should write you as I am getting none from Bob - and I would appreciate very much your telling me the amount of money Bob has to pay you monthly in accordan

establish a settlement
I will do all I can
to save any publicity
that might cause embarrass-
ment to himself and
family. —

Thanking you in
anticipation I remain —

Respectfully
Mrs R.R. Sidebotham
3122 Durango Ave
Los Angeles
Cal —

Air Mail

Mrs R.R. Sidebotham

~~Co Mrs Harry C. Thayer~~

155 Henry St.
Brooklyn
New York

~~Haverford~~
~~Philadelphia~~

Please forward

torting a settlement agreement from him. (This agreement was attached as an exhibit to her separate maintenance complaint Defendants' Exhibit C Tr. 95.) Under this remarkable document she agreed not to prosecute her husband criminally and in exchange for this he agreed to pay her $1,000.00 *and a substantial percentage of his future earnings* from one firm, apparently for an indefinite period of time, and half of his past earnings from another firm. If this is not a bold case of extortion by the respondent we have never heard of one. What else did this innocent (?) inexperienced (?) woman do? She personally wrote a letter to the first Mrs. Sidebotham on March 3, 1932, (less than 22 months after their marriage) and asked what alimony Mr. Sidebotham was paying her, saying she was going to get a divorce from him. (Defendants' Exhibit D, Tr. 97.) She said it was for the purpose of getting a settlement for herself and she promised not to embarrass *Mr. Sidebotham "and family"* by any *publicity.* This was another extortion attempt because she asked for information vital to herself and then impliedly said that if she got the information she would not expose her husband and family. In other words, she said "give me this information *or else*".

In her verified separate maintenance complaint (Defendants' Exhibit C, Tr. 95) respondent also alleged that for *two and a half* years prior thereto (i.e. commencing in September 1930, only *sixteen* months after the Mexican marriage) her husband visited her friends and made derogatory remarks about her; her complaint also alleged that she and her husband sep-

arated on February 5, 1932, and that for one year prior thereto he insisted that she go out alone when she wished to go to a place of interest or amusement; She also swore that he attempted to push her over a cliff on a trip between Los Angeles and Lake Arrowhead, and that in the summer of *1929* (only a year after their marriage) he threw a clock at her and hit her in the head; also that he failed to support her for more than a year prior to filing her complaint. How in the world could she say they were "happily married" when she complained under oath of brutal treatment of her by him for almost *four* years before filing the separate maintenance complaint in 1933, and later she admitted he deserted her completely from 1941 until he died in 1951? (Tr. 110 and 122.)

She tried to gloss over this ridiculous statement by testifying as follows:

> "Q. Yesterday you testified that you sued your husband in a suit for separation and you related in your complaint that he treated you cruelly. When did he do that?
>
> A. Only when he was intoxicated." (Tr. 127-128.)

Would she have the Court believe that he was completely intoxicated continuously for almost four years prior to her filing her complaint? Would this account for his almost complete failure to support her between 1932 and 1951? The absurdity of her statement is self-evident. The separate maintenance complaint was *never* dismissed and time marched on with the plaintiff and Mr. Sidebotham living a few years more in

Los Angeles and then moving to San Francisco. The record is very sketchy until 1941 as to how their love life prospered, but it apparently fizzled out completely in 1941; she testified that she never saw him *or heard from him* between 1941 and his death in 1951, except *one time* when she met him accidentally on the street in San Francisco. (Tr. 110 and 122.)

It is highly significant that the record does not show any attempt by appellee to locate Mr. Sidebotham in those ten years or to claim any support from him. In fact in her Nevada divorce complaint in 1946 she asked for no alimony from him and said "that there is no community property to the plaintiff and defendant hereto belonging". (Tr. 115.) He had her address at 380 Union Street, San Francisco, where she lived for many years after the Wyoming divorce in 1940. He sent her no money there, did not write to her there, nor did she know where his home was. (Tr. 98-99.) This is strong corroboration of his belief that he owed her nothing and the facts (especially the Nevada divorce complaint) *strongly indicate that she thought so too.* If she thought she had any rights against him or any prospect of collecting from him she would have and should have asked for help through her shrewd lawyer, Mr. Ruiz, as she did in 1933 when she filed her separate maintenance action, and again in 1952 when she commenced the present action. That appellee's contact with her clever counsel Manuel Ruiz, Jr., since 1932 has been more than casual can be seen from the fact that he had her living on his Mexican ranch

in 1954 for a month, i.e. after the decision on her appeal and prior to the trial. (Tr. 104.) That she did not make the statement in the Nevada complaint that "there is no community property" inadvisedly or ignorantly is shown by the fact that under *Mr. Ruiz'* able tutelage she swore in her 1933 separate maintenance complaint (Defendants' Exhibit C, Tr. 95), that *there was community property* of Mr. Sidebotham and herself. Even if Mrs. Sidebotham did not read the Nevada complaint her lawyer is presumed to have done his duty when he prepared her complaint (*Dolinar v. Pedoni,* 63 C.A. 2d 169, and *Pasadena Laboratories v. U.S.A.,* 169 F. 2d 375) and he undoubtedly got this information from her and did not make it up out of his dreams. She did not testify that she could not read or that she did not understand English. The evidence is all to the contrary. In fact at the trial she did not testify that she did not read the complaint when she signed and swore to it or that she did not understand it. (Tr. 118-120 contains *all* the evidence on the subject of the Nevada divorce case.)

Let us see now what means of knowledge were open to her after 1941 showing her *laches* from then on.

She knew how to approach the first Mrs. Sidebotham for information. (See Defendants' Exhibit D, Tr. 96 and 97.) This exhibit (the envelope) shows that respondent knew the address of Mrs. Thayer, a sister of Mr. Sidebotham. (See also Tr. 96.) She was in correspondence with her husband's other sister, Lois Umbsen, as late as 1939. (Tr. 126-127.) Respondent was Mr. Sidebotham's secretary in New

York, Boston and Los Angeles, in which last named city she knew he had *four* offices. (Tr. 97-98.) She helped him sell real estate in Los Angeles. Most of the time from 1935 to 1947 she worked for Dempsey Realty Co. in San Francisco. (Tr. 99-102.) She knew also that he bought a piece of property in Crescent City. (Tr. 102.) He was a registered voter in San Francisco at 10 Rossi Avenue and voted there from 1942 to 1950 (Defendants' Exhibit I, Tr. 227-228.), and there was a telephone at said address from May 1945 to August 1950. (Tr. 231.) In 1950 he became a record owner of an apartment house on Geary Street in that city. (Defendants' Exhibit H, Tr. 226.) During 1950-51 his address at 10 Rossi Avenue was also on the books of the Tax Collector, and the P.G.&E., to which the bills for his property were sent. (Tr. 228-229.) From 1942 to 1950 Mr. Sidebotham's address was a matter of public record in San Francisco. (Tr. 227.) During most of the same period of time she herself lived, and worked for a real estate firm, in San Francisco. (Tr. 99-100.)

Appellee knew from 1941 on that he was making no effort to support her or even to see her. If she had any *property rights* to assert against him, she should have started asserting them, or at least investigating them in 1941 and certainly any high school boy could have found his permanent address for her in a matter of hours. This lack of any action by her for ten years and until *after* he died and she had found out he had *substantial* means, completely bars and estops her from claiming any interest in any of his assets.

OBVIOUS FALSITY AND INHERENT IMPROBABILITY OF PLAINTIFF'S CASE.

A calm survey of Helene Marceau's conduct from 1926 to 1952 based on the uncontradicted evidence in this case shows she was Robert Sidebotham's companion by voluntary choice from 1926 to 1928 travelling all over the United States together "without benefit of clergy" until they were married by a Civil Officer in Tijuana, Mexico, on May 30, 1928. After that she lived on and off with him (highlighted by several severe estrangements) as long as she could until 1940 when he completely and finally abandoned her and got a divorce from her in Wyoming in 1940. In 1946 (not having heard from him or received any money from him since 1940) she divorced him, not asking for any alimony and stating in her sworn complaint "there was no common property". Her entire conduct from the beginning, as mistress, and throughout her hectic "on again, gone again", married life with him, shows she was a calculating adventuress. It also shows that she was an unmitigated liar. Consider among others, the following seven items of uncontradicted evidence:

1. Her "common law marriage" in New York on January 1, 1927 (Tr. 87-89), as pleaded in her first complaint, mysteriously withdrawn in her later pleadings, and finally positively *denied* at the trial. (Tr. 87-88.)

2. Her settlement agreement of April 24, 1930 (executed less than two years after her marriage) in which she extorted an agreement from her husband to pay her $1,000.00 in exchange for a

promise not to prosecute him for an assault and any other criminal offense (this was an attempt to compound a crime, which is of course illegal, Section 153 California Penal Code).

3. Her letter to the first Mrs. Sidebotham dated March 3, 1932 (Defs'. Ex. D), attempting to extort important information by veiled threats for the purpose of seeing how much more money she could squeeze out of her husband, which reads as follows: (See photostatic copy of letter earlier in this brief.)

4. Her separate maintenance suit which she started in March 31, 1933, in Los Angeles, California, in which she asked for more support but not for a divorce and which she never dismissed. (Tr. 96.) This complaint is full of unusually lurid allegations of physical cruelty by Mr. Sidebotham which are in marked *contradiction* of her statement in her letter of March 3, 1932, to the first Mrs. Sidebotham that: "I will do all I can to save any publicity that might cause embarrassment to himself (Mr. Sidebotham) and family". (Defs' Ex. D.) In this complaint she never once complained of intoxication by her husband which casts grave doubt on her statement at the trial that he only treated her cruelly "when he was intoxicated". (Tr. 127-128.)

5. Her complete indifference to what happened to her supposed husband between 1940 and 1952 when she learned of his death and his substantial estate. Consider also that during most of this time she and he were living in San Francisco and that she claimed she did not know he had homes in Stockton and San Francisco. (Tr. 98-99.)

6. Consider the discrepancy in the date of separation alleged in her Nevada complaint as being June 30, *1931* and her lie about its being June 30, *1941* (Tr. 116-117); also the contradiction of the same date in the Los Angeles suit in 1933. These two dates force us to believe she never lived with Mr. Sidebotham as his wife after February 5, 1932 (the separation date alleged in the 1932 suit) but only as a mistress on rare occasions.

7. Her testimony about her complaint in the Nevada suit where she alleged under oath; "There is no community property" is most unsatisfactory; in fact at the trial she made no attempt to explain away why she signed such a complaint. Mr. Manuel Ruiz, Jr., her astute lawyer *since 1933,* put an allegation in her third amended complaint in this case that "when questioned by her attorney (in Nevada), whether there was any community property, she answered that she did not know. That said attorney, unbeknownst to plaintiff, nevertheless framed a formal pleading wherein it was stated that there was no community property. That plaintiff did not read the same".

All of the testimony concerning the Nevada divorce case is on pages 83-84 and 118-120 of the record. Nowhere on any of those pages or elsewhere in the record did she back up those allegations in her third amended complaint nor did she give *any explanation of any kind* as to her signing that complaint with that allegation in it. Therefore it must stand as an uncontradicted admission against her interest, if not as a judgment against her on this issue. Her sworn testi-

mony at the trial is in fact inconsistent with her sworn statements in her third amended complaint.

The opinion of this Court in her favor in case No. 14192, 216 F. 2d 816 was based on the allegations in her third amended complaint and *not on any evidence.* Now that the evidence is so *entirely different* from her final complaint this Court must reach a different result and decide against her on the issue of *res judicata* based on the Nevada divorce, and also on the issues of laches and equitable estoppel.

TRACING OF ASSETS.

Appellee's case is based on the simple rule (and she can recover on no other theory) that any community property Robert Sidebotham had when he and she were divorced (in 1940 in Wyoming) became property owned by them as tenants in common, i.e. half and half. So far so good. But after time marched on and the husband died first, the surviving tenant in common got only the community property which was on hand *at the time of the divorce* or such property as could be *identified* as being the proceeds of or the converted form of the property on hand at the *time of the divorce.* We confidently contend that all of the property on hand at the time of the husband's death was acquired after the Wyoming (1940) divorce as his separate property or with his separate funds. However, the *burden of proof is on*

the surviving wife to identify the property on hand at death as being the community property of the spouses when their marriage was dissolved (as we shall show hereafter by cases). There is not a word in the record or even an insinuation by appellee that Mr. Sidebotham owned any community property in 1940 (and the same is true in 1946 as to more than 97% of his probate assets). Respondent made a great ado about his safe deposit box. If he had *never opened* his box after he first rented his first box in 1943 (which was almost three years *after* the Wyoming divorce) she might well say that he had owned everything that was in it from 1943 until his death. But the record card of the box (Defendants' Exhibit L, Tr. 229-230), shows that he went into the box many times a year from May 22, 1945, down to the time of his death and *fifteen* times *after* January 1, 1947. The contents of the box revealed nothing that was ear-marked as they consisted of 751 pieces of currency (denominations from $5.00 to $1,000.00 bills, totalling $64,770.00). (Tr. 191-192.) How could anyone trace the entrance of 751 bills into a safe deposit box and then prove they remained there continuously until his death when Mr. Sidebotham went in and out of the box so many times between May 22, 1945, and his death? Not a *single* piece of currency was ever traced as going *into* Sidebotham's safe deposit box. The difficulty of identifying assets in a safe deposit box is well illustrated in the case of *Corely v. Hennessey*, 58 C.A. 2d 225, 238, which case required the clear tracing of assets in an action to establish a trust.

The testimony of Mr. Fontes at the trial as to a few bank and building and loan accounts (no one of which *was in existence at the time of the Wyoming divorce)* was not helpful either. The entries of deposits and withdrawals through the years was not given and this Court knows that accounts like these are like the safe deposit box records—"In and out—in and out". The account records to have weight must show the *balances* as of the *date of the divorce (whichever year* is taken), *and* then *the balances* throughout the periods of the accounts including the balances that remained on hand *at death.* The evidence in the record is too incomplete to have any probative value.

OBVIOUS FALSITY AND INHERENT IMPROBABILITY OF PLAINTIFF'S CASE.

Plaintiff's case, which depends entirely on her own testimony, has no weight and cannot be sustained, because her testimony is obviously false.

In 4 Cal. Jur. 2d 605, it is said that a judgment is unwarranted as a matter of law

> "Where the testimony, in the light of the undisputed facts, is inherently so improbable and impossible of belief as to constitute no evidence at all."

In this case the only testimony of the plaintiff that supported her case was that Mr. Sidebotham told her several times he was "broke" and "had a hard time" *and that she believed him* (Tr. 78, 84, 102); hence she made no investigation of his finances before he died

to see if there had been any community property when she divorced him and, if any, where it went.

Flimsy as this testimony was it might support a judgment if it could be believed. It is obviously false however because *all* her testimony is incredible in view of the many falsehoods she has been caught in. In view of the history of her life with him as she told it (on the witness stand and in the complaints in her two suits against him) her alleged *belief in his statements* is inherently improbable. Such testimony cannot support a judgment.

Herbert v. Lankershim, 9 C. 2d 409, 471-473, 71 P. 2d 220, 251-252 (a suit by an unscrupulous nurse against a dead man's estate) where the Court said:

> "While the jurors are the sole judges of the facts, the question as to whether or not there is substantial evidence in support of the plaintiff's case is always a question of law for the court (Grant v. Chicago, etc., Ry. Co., 78 Mont. 97, 252 P. 382), and, in determining this question, 'the credulity of courts is not to be deemed commensurate with the facility or vehemence with which a witness swears. "It is a wild conceit that any court of justice is bound by mere swearing. It is swearing creditably that is to conclude its judgment." ' "

Citron v. Fields, 30 C.A. 2d 51, 62-63, 85 P. 2d 534, 540. In this case the Court in finding there was no substantial evidence to support the award laid stress on the poor character of the main witness in the following terms:

> "Respondent stands impeached by his own testimony and the evidence furnished by him", and

later in the opinion the Court emphasized the witness' lack of character by saying:

> "In view of the unreliability of this witness we must regard much of what he said as 'mere swearing', which cannot be regarded as substantial evidence without supporting the rather remarkable judgment of $12,000.00 to a physician whose past history in his profession is not without serious blemish."

So in the case at bar we submit that plaintiff's character, which is not without serious blemish, and her testimony which was contradictory in several important parts, and which was also impeached by sworn statements signed by her, completely destroys the value of her testimony and leaves the judgment without any credible testimony in support of it.

Guardianship of Sturges, 30 C.A. 2d 477, 496-497, 86 P. 2d 905, 914;

Estate of Teed, 112 C.A. 2d 638, 643-646, 247 P. 2d 54;

Lee Way Motor Freight v. True, 165 F. 2d 38, 41 (C.C.A. 10);

U. S. v. Thornburgh, 111 F. 2d 278, 280 (C.C.A., 8).

It is most significant and legally important that appellee admitted that the last time she saw Mr. Sidebotham was in 1947. This was *five years before* she filed this suit and the *last time* he could have fooled her, if he did. Certainly the doctrine of laches has barred her case.

THE LAW.

I.

EFFECT OF OPINION ON PRIOR APPEAL.

Preliminarily we should point out that this case was before this Court before in case No. 14,192 involving only the sufficiency of the last complaint, i.e. the third amended complaint. 216 F. 2d 816.

None of the evidence produced at the trial by the appellee and that of the appellants meeting the appellee's evidence and supporting their affirmative defenses was before this Court on the prior appeal. This completely changed the picture of the case as it appeared in the third amended complaint; in fact the proof at the trial was completely different from the allegations in the last complaint. There is therefore nothing in the prior opinion which is pertinent on this appeal. It certainly is not the "law of the case."

As to the effect of the prior opinion in this case see:

4 *Cal. Jur.,* 2d 594, Sec. 688;

DeParcy v. Liggett & Myers, 81 F. 2d 777, 779, certiorari denied in 298 U.S. 689;

Blatz Brewing Co. v. Collins, 88 C.A. 2d 438, 199 P. 2d 34.

II.

THE APPELLEE WAS REQUIRED TO PROVE THAT THE PROPERTY ON HAND AT THE DATE OF DEATH WAS THE SAME PROPERTY OWNED BY MR. SIDEBOTHAM WHEN HIS MARRIAGE WAS DISSOLVED.

The burden of proof in this case is clearly fixed on the appellee by subdivision 40 of Section 1963 of the Code of Civil Procedure, *codifying* the previously Court-approved presumption but setting a four year period in cases of divorces. This reads as follows:

> "All other presumptions are satisfactory if contradicted. They are denominated disputable presumptions and may be controverted by other evidence. The following are of that kind . . . 40. That property owned at the time of death by a person who had been divorced from his or her spouse more than four years prior thereto was not community property acquired during marriage with such divorced spouse, but is his or her separate property."

It has clearly been the law by Court decisions since *Estate of Simonton,* 183 Cal. 53, 190 Pac. 442 that after a marriage has been dissolved (such as by death of the wife or divorce obtained by the wife) and later the husband died, the wife, (or the heirs at law of the wife), claiming a portion of the husband's estate as being community property *has the burden of proving* that the property left by the husband and claimed by the wife (or by her heirs) is the same property which was on hand when the marriage relation was dissolved by the wife's divorce or death.

One of the clearest cases on this point is *in re Adams' Estate,* 132 C.A. 2d 190, 203; 282 P. 2d 190, at 198. In this case the marriage was dissolved by the death of the wife in 1941. Subsequently the husband died intestate in 1951 and certain heirs at law of the wife claimed his estate on the ground it was community property. The Court recognized the rule of law stated by respondent that property on hand *when the marriage was dissolved* is presumed to be community property as of that time, but the Court pointed out that this is only half of the legal problem. The Court said after a claimant identifies certain propery as being on hand *when the marriage was dissolved* (which would presumably make it community property in the absence of proof to the contrary), *he* then has the burden of proving that the property on hand *when the surviving spouse,* (such as the husband here) *died* was the same property as the community property *on hand when the marriage was dissolved.* One of the main points at issue in that case was as to certain valuable securities which were on hand at the time of the death of the husband, the surviving spouse. The Court said that the heirs of the husband who claimed that the securities were his separate property made out a prima facie case by showing that the securities were in his estate at the time of his death. The Court then went on to say that the heirs at law of the *spouse first dying* then *had the burden of proving that the securities were the community property* of the two spouses. The reasoning of the Court on this point is as follows:

". . . upon the death of the wife, intestate, where the husband acquires all of the community property, he becomes the absolute owner of it, so that there no longer is community property in the true sense, nevertheless for purposes of succession under section 228 of the Probate Code, 'the statutory provisions determining what is community property as construed by our decisions remain in force and applicable throughout the life of the surviving spouse, *as to all property constituting community property of the spouses at the time of the death of the pre-deceased spouse.*' In re Estate of Brady, 171 Cal. 1, 7, 151 P. 275, 277. *But when the surviving spouse dies intestate, the presumption is that all property in his estate is his sole and separate property, and the one claiming it to be community must assume the burden of proving what portion of that estate was in fact the community property* of the two parties at the time of the death of *the predeceased spouse.*"
(All emphasis ours throughout.)

. . . . . .

"Upon his death intestate the heirs of the wife who, by virtue of section 228, became the statutory heirs of the husband, are entitled under that section in the circumstances there set forth, to one-half of the property that was formerly community property. But *the burden is on them to prove what was community property, and to trace it into the estate of the surviving spouse.* That burden requires *two steps* in the proof. First, as already pointed out, the predeceased spouse's heirs must prove what portion of the property was community property at the time of the death of the predeceased spouse. In making that proof, as already

held in this opinion, the presumption is that property acquired or in possession during the marriage was community property. *Then the heirs of the predeceased spouse have the burden of tracing the community property into the property found in the estate of the surviving spouse. In meeting this burden such heirs now find the presumptions reversed.* Now the presumption is, that the property in the estate of the surviving spouse, is the separate property of the surviving spouse, and, under the rule of the cases cited above, *the heirs of the predeceased spouse must overcome that presumption by tracing the community property existing at the death of the predeceased spouse into the estate of the surviving spouse.* Failing to so trace the community property *by overcoming the presumption of separate character,* the property in the estate of the surviving spouse must be treated as the separate property of the surviving spouse and distributed to his blood heirs." (all italics throughout added.)

. . . . . .

The most important statement in this opinion, and which is completely applicable in the present case, is the statement that when the heirs of the predeceased wife sought to claim the property of the husband as community property, the usual presumptions *were reversed* when the death of the surviving spouse occurred. As Mr. Justice Peters said "In meeting this burden such heirs now find *the presumptions reversed.*"

In the case quoted the marriage was dissolved by the death of the wife and not by her divorce as in this

case. The rights of the husband's heirs and the rule as to presumptions must be the same whether the marriage was dissolved by death or divorce.

See also

In re Hanson's Estate, 126 C.A. 2d 71, 77, 271 P. 2d 563, 567;

Estate of Doran, 138 A.C.A. 618, 625, 627, 628, 292 P. 2d 655, 661-662;

Estate of Rattray, 13 C. 2d 702, 705-706, 91 P. 2d 1042;

Estate of Simonton, 183 Cal. 53, 59-60, 190 P. 442, 445;

Estate of Harris, 9 C. 2d 649, 662, 72 P. 2d 873;

Estate of Anderson, 142 A.C.A. 453, 298 P. 2d 105, 107 decided June, 1956.

If community and separate property are so commingled that its identity can't be traced it will be presumed to be separate.

Pickens v. Marriam, 274 Fed. 1, 11 (C.C.A. 9);

Estate of Brady, 171 Cal. 1, 5, 151 Pac. 275;

Moore Estate, 65 Cal. App. 29, 31-33, 223 P. 73.

III.

THE DECREE ESTABLISHING HEIRSHIP IN THE MATTER OF THE ESTATE OF ROBERT RUSSELL SIDEBOTHAM IN THE SAN FRANCISCO SUPERIOR COURT, FILED ON DECEMBER 14, 1953, IS RES JUDICATA OF THE MAIN ISSUES IN THIS CASE.

Examination of the third amended complaint in the present case and comparison of it with the petition in the heirship matter filed in the San Francisco Superior Court on December 4, 1952, demonstrates clearly that the same issues were involved in the heirship proceeding as in this proceeding and substantially the same parties were involved, except for the addition of the Public Administrator as a defendant in this case. As a matter of law he of course represents the sons who are the real parties in interest other than creditors and taxing agencies.

Appellee's counsel will argue that in spite of the fact that *Mrs. Sidebotham filed the petition* in the heirship proceeding she could ignore it when she received notice of the hearing on her petition. She claims that the Probate Court had no jurisdiction to hear this proceeding because she was a stranger to the estate. She overlooks the fact that the Probate Court of California was then a Court of general jurisdiction as stated in *Schlyen v. Schlyen,* 43 Cal. 2d 361, 273 P. 2d 897, being merely a division of the Superior Court of California with all its general jurisdiction and not a separate Court with limited jurisdiction. Since Mrs. Sidebotham *voluntarily commenced* the proceeding by *filing her petition* in the probate division and the two sons who were the real parties in interest appeared by

their formal answer, the issues were joined in the probate division and that division became then in effect a Court of equity and could dispose of the issues, even though that division could not have made a decree against her if she had been an objecting defendant rather than the petitioner.

Faxon v. All Persons, 166 Cal. 707 at 711 and 712, 137 Pac. 919;

Wells Guardianship, 140 Cal. 349 at 352; 73 Pac. 1065;

Estate of Riccomi, 185 Cal. 458 at 463; 197 Pac. 97.

The last cited decision held that a case was properly tried in the Superior Court even though it was entitled as a probate matter; see also *Laurel Hill Cemetery v. All Persons,* 69 C.A. 2d 190 at 200; 158 P. 2d 759. In this case it was held that the Superior Court did not have jurisdiction to try a McEnerney suit because all of the defendants had not been served, but that the decree made by the Superior Court was valid as a general quiet title decree because the appealing defendants appeared in the action and did not contest the right of the Court to try the action as a general quiet title action as far as they were concerned.

See also the opinion by Judge (later Chief Justice) Taft in *Elder v. M'Claskey,* 70 Fed. 529 at 554 (C.C.A., Sixth Circuit, 1895).

In this case it was contended that the trial Court could not take jurisdiction over a partition suit in equity before the disputed questions of title had been

settled by an action at law. Judge Taft answered this contention in his opinion by saying:

> "As the complainants and cross-complainants went into equity they cannot complain of a decree on the merits."

See also 21 C.J.S. 132 Section 85 Courts.

It is well established and therefore conclusive in this case that the Probate Court has concurrent jurisdiction with the Superior Court where all the parties appear and do not object to the Probate Court acting as the Superior Court.

> *Medeiros v. Cotta,* 130 C.A. 2d 740, 279 P. 2d 814.

In this case a widow filed an action in the *Superior Court* against the grantee of a deed from her husband to set aside the conveyance of half the property conveyed by him as community property. The trial Court held this cause should have been tried in the probate division which it thought had exclusive jurisdiction. The Appellate Court conceded that before the decision in *Schlyen v. Schlyen,* 43 Cal. 2d 361, 273 P. 2d 897, this question might have been decided in favor of the probate division's exclusive jurisdiction, but that the *Schlyen* case required a holding that the case was properly tried by the Superior Court. This was because the plaintiff allowed the probate proceeding to be closed before trial of her action in the Superior Court and that she made no objection to the trial by the Superior Court. The opinion of the Court on this point is as follows:

> "So even assuming that the action filed by respondent was to recover property wrongfully claimed by the representative of the estate and to have it included in the assets of the estate, it is clear from the opinion in Schlyen v. Schlyen that *respondents failed to make a timely objection that the issues involved should be tried in probate.*"

In *Medeiros v. Silva,* 132 C.A. 2d 771 at 775, 283 P. 2d 50, almost identically the same facts occurred as in the last case and the Court summed up its holding on the jurisdictional question in the following language:

> "the jurisdiction of the superior court sitting in probate to try title to property as between heirs and personal representative is not exclusive, and the superior court under its general equitable jurisdiction may also, *in the absence of timely objection,* try such title in widow's action to set aside husband's gift of her share of community property made before his death."

Another case containing the same holding is *Medeiros v. Medeiros,* 138 A.C.A. 230 at 234, 291 P. 2d 142. In the following cases it was held that the failure of parties to object to the Superior Court exercising its general powers even through the matters before it were usually tried in the probate division of that Court estopped such parties from complaining thereafter of any lack of jurisdiction.

Simons v. Bedell, 122 Cal. 341, 346, 55 Pac. 3.

Here a plaintiff went into a Court of equity to determine who was entitled to distribution of property which was being administered in the probate division. The fact that no objection was made to the Superior

Court going ahead with the trial was held to estop any complaint on the ground of lack of jurisdiction.

See also:

In re Clary, 112 Cal. 292 at 294, 44 Pac. 569;
In re De Leon, 102 Cal. 537 at 541, 36 Pac. 864;
Thompson's Estate, 101 Cal. 349 at 353, 35 Pac. 991, 992.

Entirely apart from these older holdings, the *Schlyen* case made it quite clear (43 C. 2d 361, 376, 273 P. 2d 897, 900) that as the result of the Court reorganization legislation which took effect on January 1, 1952, a case which was set for trial in the equity division, but properly belonged in the probate division, would not be dismissed for lack of jurisdiction by the equity division, but would be transferred to the probate division on request by a simple minute order. So in the proceeding to determine heirship referred to, if Helene Marceau Sidebotham had appeared and had objected to the trial by the probate division, that division would by a simple minute order have transferred the matter to the equity division. Its failure to do so, however, in the absence of a request by Helene Marceau Sidebotham, did not deprive it of jurisdiction to go ahead with the hearing. The reasoning of the Court in the *Schlyen* case on this point is as follows:

> "The notice of this motion was filed on December 3, 1951, 29 days before January 1, 1952, the effective date of the court reorganization legislation. If this action had been commenced after January 1, 1952, and it appeared by appropriate order and showing that the court was without jurisdiction of the subject matter, the court could have trans-

ferred the cause to the proper court for disposition. But it is not necessary to seek to apply the new rule of procedure to this case for the reason that here we have a case where the superior court in which the action is pending had jurisdiction of the subject matter of the action *either as a case to be disposed of in the exercise of its equity jurisdiction or to be adjudicated in the probate proceeding pending in the same court, depending on the circumstances existing at the time the motion to dismiss was made. Where the superior court has jurisdiction over the particular class of cases in question it is the established rule that if no objection on the ground of another action pending or other appropriate objection be timely made it is deemed to be waived.* In re Estate of Dombrowski, 163 Cal. 290, 297, 125 P. 233; In re Estate of Latour, 140 Cal. 414, 425-426, 73 P. 1070, 74 P. 441."

In this case the proceeding to determine heirship was commenced after January 1, 1952, when the Court reorganization legislation took effect.

Appellee will probably answer that a party cannot give jurisdiction to a Court, not having it, by consent or by failure to object. This is true as to jurisdiction over the *subject matter* but it is not true as to jurisdiction *over the parties*. The Probate Court has always had jurisdiction over the *subject matter* of heirship determination but not over *parties* strangers to the estate. Hence appellee could and did waive lack of jurisdiction over her person by initiating the proceeding. This distinction is well stated in 13 Cal. Jur. 2d 591, sec. 82 Courts, as follows:

> "The rule that jurisdiction of the subject matter cannot be conferred by the consent or acts of the parties has no application where the question is as to a tribunal's jurisdiction over the *person* of a party to a controversy, and where the tribunal has jurisdiction of the subject matter. Jurisdiction over the person can be conferred by consent, manifested by the party's voluntary appearance, as provided by the Code of Civil Procedure, or by his seeking, taking, or agreeing to some act or step in the proceeding or action."

IV.

THE DISTRICT COURT ERRED IN NOT GIVING FULL FAITH AND CREDIT TO THE WYOMING DECREE.

The decree of divorce dated November 2, 1942, rendered by the District Court of the Second Judicial District sitting within and for the County of Albany and for the State of Wyoming contains the following recitals:

> "and it appearing to the court that due and legal service has been had on the defendant by publication, a proof of which publication is filed herein; and it appearing further from the affidavit of the plaintiff that he has exercised due diligence and inquiries as to the whereabouts of the defendant; that her residence is unknown and cannot with reasonable diligence be ascertained and the defendant being in default for want of an answer", etc. (Defs'. Ex. E.)

This decree was made after an affidavit was filed by the plaintiff Robert R. Sidebotham on August 6, 1940, in which he said:

"that he has exercised due diligence and inquiry as to the whereabouts of the above named defendant and that he finds that said defendant does not reside in the State of Wyoming; that her residence is unknown and cannot with reasonable diligence be ascertained; and that from the facts above stated this case is one of those mentioned in Section 89-817 and 89-822 Revised Statutes of Wyoming, 1931." (Defs.' Ex. E.)

It should be noted parenthetically that under the statutes of Wyoming no order of publication of summons is required before publication of summons takes place. Therefore the Courts are more liberal in construing affidavits made prior to publication under such statutes than they would be in a state like California where the Court must make an order for publication of summons before the summons can be published. The affidavit in the Wyoming divorce case is almost identical with the affidavit in *Clarke v. Shoshoni Lumber Co.,* 224 Pac. 845 at 849 and 850. The affidavit in the last named case was approved by the Supreme Court of Wyoming and subsequently a writ of error from this decision was dismissed by the U.S. Supreme Court, which refused to disapprove the opinion of the Wyoming Court approving the service of summons by publication in that case.

It is elementary that the recitals in the decree of a Court of general jurisdiction as to the service of summons cannot be collaterally attacked.

49 C.J.S. 849, sec. 427 Judgments, states the rule well as follows:

> "Where a court of general jurisdiction judicially considers and adjudicates the question of its jurisdiction, and decides that the facts exist which are necessary to give it jurisdiction of the case, the finding is conclusive, as discussed in Courts sec. 115, and generally cannot be controverted in a collateral proceeding."

See also *Davis v. Johnston,* 144 F. 2d 862 (C.C.A. 9th-1944) certiorari denied by Supreme Court, 323 U.S. 789.

It has been held several times recently by the Wyoming Supreme Court that the recitals in the decree as to procedural steps are conclusive and cannot be attacked by anything outside the record.

Jones Truck Co. v. Superior Oil, 234 P. 2d 802, 809;

Hume v. Ricketts, 240 P. 2d 881 at 882.

Since the affidavit of publication is not even a part of the judgment roll according to Wyoming law (Wyoming Compiled Statutes of 1945, Section 3-5406), it would seem that the sufficiency of the affidavit of publication of Robert Sidebotham, deceased, cannot even be considered on collateral attack.

Hoagland v. Hoagland, 57 P. 20 at 22 (Utah).

V.

HELENE MARCEAU SIDEBOTHAM HAS BEEN GUILTY OF INEQUITABLE LACHES AND DELAY AND THE DISTRICT COURT ERRED IN NOT HOLDING THAT HER ACTION WAS BARRED BOTH BY LACHES AND BY THE DOCTRINE OF EQUITABLE ESTOPPEL.

Our contention on this point is best stated in the following quotation from the opinion in *Champion v. Wood,* 79 Cal. 17, 21 Pac. 534, in which the Court stated the facts and its conclusions about the conduct of the wife in that case quite fully as follows:

> "It seems quite incredible that the plaintiff, while engaged in a hostile action against her husband, could cherish such unbounded love and confidence in him as is set forth in the complaint. For a period of 16 months before she commenced her action for a divorce she was unable to live with him. His conduct had been such—he had so far forgotten his marriage vows—that she not only could not live with him, but she demanded that the bonds existing between them should be severed. With the improbability of the truth of plaintiff's statements, however, we have little to do in determining whether the facts are sufficient on demurrer; but a stale demand, under such circumstances, does not commend itself to a court of equity. The plaintiff severed all connections with her husband on October 11, 1884. *This action was not commenced until about three years and a half thereafter.* It is clear that the question of property was not overlooked in the divorce suit. There was inserted in the complaint an allegation 'that there was no common property'. It is not at all probable that the plaintiff drew her own complaint, and conducted her own case. The general rule is that the judgment of a

court of competent jurisdiction, having jurisdiction of the subject and the parties, is conclusive upon the same parties in any other proceeding in law or in equity, unless reversed or set aside in some mode prescribed by law. Judgment may be attacked on the ground of fraud and misrepresentation, it is true, but relief will not be granted unless the party seeking the same has been free from negligence. If the judgment has been brought about through the carelessness of the injured party, he will not be relieved therefrom. *Quinn v. Wetherbee,* 41 Cal. 250. *The relations of the plaintiff here with her husband were such that it was negligence, we think, on her part to rely upon him in a matter of so much importance as her property rights.* Having determined that the bonds of matrimony must be dissolved, *the first thought which would naturally occur to a person of ordinary caution and care would relate to the children, if there were any, and to the property. Plaintiff's failure to obtain independent advice and information was inexcusable carelessness.* Something must have been said to her attorney about the property when drawing the complaint. *That was the time and the occasion for consultation with her legal advisor as to her property rights.* A simple question, propounded at that time, would have led to a different result. The fact alleged 'that her husband systematically and persistently, during all the time of their residence in California, continuously represented, declared, and asserted to plaintiff that the property he owned and had acquired since said marriage was his sole and separate property,' etc., was sufficient of itself to create suspicion in the mind of plaintiff, as a prudent person, and, when

> continued for several years after separation and divorce, to lead her to make some inquiry on the subject. We agree with the court below that 'the complaint fails to show any equities entitling the plaintiff to relief.' "

The opinion was joined in by those outstanding jurists Chief Justice Beatty and Mr. Justice McFarland. It is particularly strong here because it was decided that the complaint was insufficient as against *general demurrer.*

Consider in particular the following facts in *Champion v. Wood* on which the Court based its opinion which are parrallel to those in the present case (1) the period of several years far in excess of the sixteen (16) months in the *Champion v. Wood* case in which the appellee did not live with her husband; (2) the dissolution of the bonds of matrimony by the wife herself about five (5) years before the husband's death; (3) the commencement of the present action more than sixteen (16) months after the severance of all connections between the wife and the husband, more than three and a half (3½) years before the divorce suit which in this case was a lot longer; (4) the fact stated in *Champion v. Wood:*

> "It is not at all probable that the plaintiff drew her own complaint and conducted her own case;"

(5) The conclusion stated in *Champion v. Wood* that:

> "if the judgment has been brought about through the carelessness of the injured party, he will not be relieved therefrom,"

should apply equally well here.

(6) The negligence of the wife in not making any investigation of her property rights for more than 3½ years; (7) Mrs. Sidebotham's claim that her husband told her several times he was broke; but as was said in *Champion v. Wood:*

> "The relations of the plaintiff here with her husband were such that it was negligence, we think, on her part to rely on him in a matter of so much importance as her property rights."

(8) Quoting again from this case:

> "Having determined that the bonds of matrimony must be dissolved, the first thought which would naturally occur to a person of ordinary caution and care *would relate to the property;*"

(9) Again as was said in *Champion v. Wood:*

> "Plaintiff's failure to obtain independent advice and information was inexcusable carelessness;"

(10) Once more as said in *Champion v. Wood:*

> "Something must have been said to her attorney about the property when drawing the complaint."

Otherwise the language that there was no community property would not have appeared in the complaint as her lawyer was presumed to have done his duty in the absence of clear proof to the contrary;

(11) Therefore, as the Court said in *Champion v. Wood:*

> "that (the time she got the divorce) was the time and the occasion for consultation with her legal adviser as to her property rights."

Mr. Sidebotham did not hide from appellee in this case and she could have easily found him and served him with process at any time for nearly ten years before he died. He was registered continuously as a voter at 10 Rossi Avenue, San Francisco, for nearly ten years. (Tr. 227.) During most of that time there was a telephone at that address in the name of Ruth Ramsey. (Tr. 231.) Appellee during most of that time was also a resident of San Francisco. Tr. 227.) In 1950 Mr. Sidebotham bought an apartment house worth $30,000 (Tr. 226), and *put it in his own name*. During most of the time from 1940 to 1951 appellee worked for a real estate firm in downtown San Francisco. (Tr. 99-100.) Undoubtedly her firm subscribed to "Edwards Abstract", a daily publication which reported all real estate transfers in San Francisco. (Tr. 233-234.) It is inconceivable that she, or at least a fellow employee of hers, did not see the record of the purchase of the $30,000 apartment house in Mr. Sidebotham's name, and comment on it. A visit to the Assessor's office in the City Hall in San Francisco would quickly have disclosed to her the address to which the Assessor's office was sending the tax bill for this property to Mr. Sidebotham. A visit to the Registrar of Voters' office in the City Hall at any time for nearly ten years prior to Mr. Sidebotham's death would have disclosed his address as 10 Rossi Avenue, San Francisco. (Tr. 227.)

Why did Mrs. Sidebotham not contact Mr. Sidebotham in San Francisco for ten years? Because she knew (as she alleged in her Nevada complaint)

that he owned no community property of their marriage in 1946 and she knew that *as long as Robert Sidebotham was alive* he could prove it.

As soon as Robert Sidebotham died she knew his mouth was stopped, that his family were non-residents of California (Tr. 96, 126-127), and that his books and records would probably be hard to find. She also felt confident that her unsavory past would not be disclosed nor her history of seeking to squeeze money out of him on at least three occasions, starting at least as early as 1932, if she did not sue until after his death.

This explains why she came out of hiding in 1952 and started her campaign to grab his substantial assets.

In addition to all of these circumstances relied on by the California Supreme Court in finding laches in *Champion v. Wood,* it must never be forgotten that the mouth of the husband is now stopped by death, his witnesses and his records are unknown and scattered to the four winds, and the administrator of his estate is at a great disadvantage in making any defense to this action.

All of these facts bar the appellant in this case from asserting her cause of action, both on the ground of laches and on the ground of equitable estoppel.

MISCELLANEOUS RULINGS ON EVIDENCE COMPLAINED OF.

(a) The Court erroneously admitted in evidence the testimony of Daniel J. Byrne, an employee of the

American Trust Company at its safe deposit department in its branch bank at Stockton and O'Farrell Streets, San Francisco, California. The testimony in question attempted to identify a contract for the rental of safe deposit box No. 1861 in the Security Safe Deposit Company in the City and County of San Francisco, State of California, dated January 9, 1943. Objection was made to the admission in evidence of this contract in the following language:

> "Mr. Trowbridge. I think, Your Honor, that we have showed that there is no foundation there.
>
> The Court. In what respect hasn't the foundation been laid?
>
> Mr. Trowbridge. Because it is a separate bank, a separate independent bank; no employee of the American Trust Company has filled out any of the blanks on this form. It is purely hearsay, entries by third persons in another bank, and I don't see how that can possibly be admissible."
>
> (Tr. 133.)

This contract was marked Plaintiff's Exhibit 6 (Tr. 134), subject to a motion to strike out, and a motion to strike this evidence out was made at the end of the trial and never acted on by the Court (Tr. 235-238).

(b) There was admitted in evidence over our objections a series of two cards relating to an "Individual Lease Agreement" for the same box, No. 1861, in the same safe deposit company, the Security Safe Deposit Company in the City and County of San Francisco, State of California, which was admitted

by the Court subject to a motion to strike. This was marked Plaintiff's Exhibit 7. (Tr. 136.) A motion to strike it out was made at the end of the trial and never acted on by the Court. (Tr. 235-238.) The objections of counsel to the admission of these cards in evidence was as follows:

> "Mr. Trowbridge. We object to this on the same grounds, no proper foundation laid, hearsay, not a business record maintained by the American Trust or by this gentleman.
>
> The Witness. We used that card.
>
> Mr. Trowbridge. Just a moment, please. And that it is irrelevant, immaterial and incompetent."
>
> (Tr 134.)

(c) The Court admitted in evidence over our objections a card containing a contract relating to safe deposit box No. 2173 dated May 21, 1945 of the American Trust Company branch bank at Stockton and O'Farrell Streets, San Francisco, California. This card was marked Plaintiff's Exhibit No. 8 (Tr. 139) subject to a motion to strike.

Objection to the admission in evidence of this testimony was made by counsel in the following language:

> "Mr. Trowbridge. Just a moment. Will it be understood we have the same objection to this testimony that we made to the other testimony?
>
> The Court. A running objection.
>
> Mr. Trowbridge. It is a running objection, Your Honor, subject to a motion to strike?
>
> The Court. Right."
>
> (Tr. 139-140.)

A motion to strike out this card was made at the end of the trial and never acted on by the Court. (Tr. 235-238.)

The objection was the same objection that was made to the exhibit described in specification "a" hereof and was incorporated by reference as shown by the later ruling of the Court stated as follows:

> "Mr. Trowbridge. Just a moment. Will it be understood we have the same objection to this testimony that we made to the other testimony?
>
> The Court. A running objection.
>
> Mr. Trowbridge. It is a running objection, Your Honor, subject to a motion to strike?
>
> The Court. Right."
>
> (Tr. 139-140.)

(d) The Court erroneously admitted in evidence over counsel's objection the oral testimony of Daniel J. Byrne reading as follows:

> "Mr. Ruiz. Q. Calling your attention to Plaintiff's Exhibit 6, being the original contract dated January 9, 1943, on the reverse side thereof it gives an address, 220 Golden Gate Avenue, and it says 'Notify Lois Umsen.' Can you tell me, if you know, who put that name of the sister down there, Umsen?
>
> A. Well, I am pretty sure that is Mr. Jones' handwriting.
>
> Q. Mrs. Jones?
>
> A. Mr. Jones. Both he and she were then Mr. Jones.
>
> Q. Who is Mr. Jones?
>
> A. He was the man that ran that vault; it used to belong to the Brotherhood Bank.

Q. Are you acquainted with Mr. Jones' signature?''

(Tr. 139.)

This testimony was objected to in the same language quoted under specification (c) hereof and subject to a motion to strike. (Tr. 139-140.) A motion to strike out this testimony was made at the end of the trial and was never acted on by the Court. (Tr. 235-238.)

(e) The Court erred in admitting in evidence Plaintiff's Exhibit No. 9, over counsel's objection and subject to a motion to strike. The motion to strike out was made at the end of the trial and was never acted on by the Court. (Tr. 235-238.) The grounds for the objection to the admission in evidence of Plaintiff's Exhibit 9 were set forth in the objection of counsel to the evidence described in specification ''a'' hereof, which by order of Court was made applicable to all subsequent testimony along the same line. See the language quoted at the end of specification ''a'' hereof.

(f) The Court erred in admitting in evidence over the objections of counsel certain testimony of Frank J. Fontes the full substance of which is a summary of accounts with the following named banks, building and loan associations and stock brokers, giving the dates when the accounts were opened and the amounts collected by the defendant administrator, as follows (Tr. 174-183):

Names of Institutions	Dates of Opening Accounts	Original Amounts	Amounts Due at Death
Eureka Federal Savings & Loan Assoc.		~~$4,000.00~~	~~$4,155.29~~
Pacific Nat'l Bank	Nov. 21, 1946	$ 400.00	~~$ 525.79~~
Bank of America (Los Angeles)	Feb. 24, 1947	~~$ 800.00~~	~~$1,120.79~~
Anglo California (Market-Jones)	Feb. 7, 1946	~~$ 610.00~~	$ 433.24
Anglo California (Market-Jones)	Aug. 31, 1946	~~$ 867.27~~	0
Bank of America (Arguello-Geary)	May 14, 1947	~~$ 500.00~~	~~$2,524.75~~
Bank of America (Day & night office)	June 5, 1943	$1,203.14	~~$1,867.00~~
Merrill Lynch (stock brokers)	Feb. 8, 1946	~~$1,500.00~~	$ 792.10

The amounts stricken out should be disregarded ither

(a) because they are in excess of the amounts on hand at the time of the Nevada decree, or

(b) because the evidence does not show that the accounts were in existence at the time of the Nevada decree, or

(c) because they were not on hand or traceable into other assets at the time of Mr. Sidebotham's death, or

(d) they were lower at death than when the accounts were opened.

The total of the accounts properly indentified as to ates and amounts is only $2,828.48.

The objection to said testimony was that it was earsay, incompetent, irrelevant, immaterial, no

proper foundation laid and not the best evidence, and it was stated as follows:

> "Mr. Trowbridge. All right; pardon me. We will make the same objection to this line of testimony, Your Honor; that it is obviously based on hearsay and incompetent, irrelevant and immaterial and no proper foundation laid. This again is merely a petition for instructions and anyone can see that it is hearsay. It is not in the form of an affidavit as to the particular facts that show in that exhibit but was merely put in there for information by the Administrator so that he can tell the Court what claims he has to meet and what money he needs to investigate these claims. It is obviously hearsay, and we will again make that objection. (Tr. 172)"

It was admitted subject to a motion to strike out. A motion to strike out this testimony was made at the end of the trial and was not acted on by the Court. (Tr. 235-238.)

(g) The Court erred in admitting in evidence over counsel's objection Plaintiff's Exhibit No. 12 (Tr. 168) subject to a motion to strike. A motion to strike out said evidence was made at the end of the trial and it was not acted on by the Court. (Tr. 235-238.) The objection to the admission in evidence of Plaintiff's Exhibit 12 was stated at the trial as follows:

> "We will object to that, Your Honor, as being hearsay. The proper foundation isn't laid for it. It is obvious it is a copy of a report of a government agent, and it must be based on hearsay." Also, that it was "immaterial, irrelevant and incompetent". (Tr. 168-171.)

CONCLUSION.

The decision in this case must be reversed not only on one single ground, but on many grounds none of which can be overcome by any argument, in spite of the clever and persistent campaign plaintiff and her shrewd lawyer working together have waged *since before 1933* to get a substantial part of Sidebotham's property.

Since the evidence of plaintiff cannot possibly be strengthened on a re-trial we submit that not only should the judgment be reversed but it should be reversed with instructions to the District Court to enter judgment in favor of the defendants.

See

Massachusetts Mutual v. Pistolesi, 160 F. 2d 668, (C.C.A. 9th per Denman);

American Trust Co. v. Dixon, 26 C.A. 2d 426, 438; 78 P. 2d 449, 455.

Dated, San Francisco, California,
September 4, 1956.

Respectfully submitted,
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